United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

74-1851

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P/S

United States Court of Appeals

For the Second Circuit.

ROBERT A. W. CARLETON, JR.,
d/b/a CARLETON BROTHERS COMPANY,

Plaintiff-Appellant,

-against-

UNION FREE SCHOOL DISTRICT NO. 8,
TOWN OF ORANGETOWN, ROCKLAND COUNTY, NEW YORK,
GEORGE W. RENC, LEE N. STARKER, EDWARD C. MANNING,
WALTER REINER, RICHARD STOBEAUS, and
CAUDILL, ROWLETT AND SCOTT,

Defendants-Appellees

On Appeal from the District Court of the United States
Southern District of New York

APPELLANT'S REPLY BRIEF UPON APPEAL

ROBERT A. W. CARLETON, JR.
Plaintiff-Appellant Appearing Pro Se
1078 Anderson Avenue
Palisades, New Jersey 07024

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REPLY BRIEF OF PLAINTIFF-APPELLANT

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Statement

In our principal brief on this appeal, we urged that the complaint states a cause of action upon which relief may be granted; relief from a judgment or an order may be obtained by an independent

action; that plaintiff's motion for renewal and/or re-argument was timely and did not violate Local Rule 9(m); and in the absence of a valid affirmative defense and with clearly delineated issues of fact, it was an error for the lower court to grant defendants' motion for summary judgment. We think these points were adequately demonstrated in our main brief, and will not burden the Court with further discussion of them. We make only these brief responses to the Appellees' brief:

POINT I

THE DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE ARE GENUINE ISSUES OF FACT TO BE TRIED.

Here in the Southern and Eastern Districts of New York, General Rule 9(g) provides:

> "Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried."

Nowhere in the moving papers submitted by the defendants is any statement complying with Local Rule 9(g).

The gravamen of Carleton's complaint is that he seeks relief from the judgment settling the first action and the equitable recission of the stipulation upon which the said judgment was entered, as well as the general releases executed contemporaneously therewith, upon the ground that he was induced by trick and device to consent to the said stipulation and to sign the said releases as a result of duress, threats, pressure, extortion and overbearing on the part of the defendants and others, that there was an inadequacy of consideration, and certain related grounds.

In moving for summary judgment, the defendants alleged that they played no part in the determination of Carleton to settle the earlier action and that neither they nor their attorneys had any contact with him in this respect. However, Carleton, in effect, alleges a conspiracy between the defendants, the counsel for the defendants, and, in fact, Carleton's own counsel in the first action. Unfortunately, the facts required to substantiate the conspiracy are unavailable to Carleton at this time and can only be produced through extensive disclosure proceedings. Accordingly, it is a simple "his word" against "their word" situation creating a triable issue of fact!

The defendants simply filed affidavits asserting their denials of the allegations set forth in the complaint without any supporting facts. In opposing the motion for summary judgment, Carleton presented every piece of documentary evidence available to him and gave a complete recitation of the facts as they were known to him.

It is well settled law that if any party shows that there is a triable issue of fact, a motion for summary judgment will be denied. Likewise, the Court reads affidavits in opposition to a motion

for judgment most liberally in favor of such opposition. Even if the existence of a triable issue of fact is doubtful, the Court will deny a motion for summary judgment.

On a motion for summary judgment, the proponent is called upon to submit facts, as is the opponent, to show that there is a prima facia case or a defense thereto. Merely pleading denials, as the defendants have done in favor of their motion for summary judgment, is and has been held to be insufficient from the date when summary judgment was put into the Rules of Civil Practice.

In Dwan v. Massarene, 199 A.D. 872, the Appellate Division of the Supreme Court of the State of New York in its earliest decision involving summary judgment, said:

> "The power is given to the Court, but it is needless to say that it must be exercised with care, and not extended beyond its just limits. The Court is not authorized to try the issue, but is to determine whether there is an issue to be tried. If there is, it must be tried by a jury. Plaintiff's affidavit must state such facts as are necessary to establish a good cause of action. It will not be sufficient if it verifies only a portion of the cause of action, leaving out some essential part thereof. It must state the

amount claimed, and his belief that there is no defense to the action. The defendant must show that he has a bona fide defense to the action, one which he is able to establish. It must be a plausible ground of defense, something fairly arguable and of a substantial character. This he must show by affidavits or other proof. He can not shelter himself behind general or specific denials or denials of knowledge or information sufficient to form a belief. He must show that his denial or his defense is not false or sham, but interposed in good faith and not for delay. If he shall show such facts as may be deemed by the judge hearing the motion, sufficient to entitle him to defend, this Court will not review the order, as we consider that no substantial right of the plaintiff has been violated."

Again in Dodwell & Co. v. Silverman, 234 A.D. 362, the same Court said:

"This motion called upon the defendant to assemble and reveal his proofs in order to show that the matter set up in his answer were real and were capable of being established upon trial. Inasmuch as the dealings between the defendant Denis-Freres were entirely by letters and cables, plaintiff produced all such writings bearing upon the transaction. It was then the duty of the defendant to set forth any further correspondence, if such there were, in support of the averments of the answer. This he has totally failed to do. Mere general averments will not suffice.

> The moving papers show conclusively that there is no merit in defendant's claims that any of the merchandise was sold by sample, or was not of the quality contracted for, or that it was not shipped purusant to contract. The alleged loss of weight of the Cassia is shown to be usual and due to evaporation. The correspondence and the undenied interviews had by plaintiff's representative with the defendant demonstrate that the real reason why these drafts were not met and these defenses asserted was the decline in the market price and also the defendant's inability to meet them at maturity."

Accordingly, the defendants have attempted to use naked denials of certain elements of plaintiff's cause of action as the ground for the motion of summary judgment under Rule 56. Such a cavalier attitude in dispensing with a proceeding to investigate their conduct in a prior action is totally reprehensible. With viable issues of fact presented to the trial Court, it was an error to grant the defendants' motion for summary judgment dismissing the complaint.

POINT II

CARLETON HAS A VIABLE REMEDY IN SEEKING RELIEF AGAINST A PRIOR JUDGMENT BY WAY OF AN INDEPENDENT ACTION.

The power of equity to grant relief against judgments the enforcement of which would be unconscionable is of long standing (See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 88 L. Ed. 1250, 64 S.C.T. 997; United States v. Hartford-Empire Co., 73 F. Sub. 979; In Re: New England Oil-Refining Co., 9 F. 2d 344). As originally adopted, Rule 60 of the Rules of Civil Procedure generally governing the subject of relief against judgments, did not purport to impair recourse through an "action" for such relief (Oliver v. City of Shattuck, 157 F 2d 150; Fiske v. Budner, 123 F. 2d 841). Now, an amended Rule 60 (b) provides that it does not limit the power of the court to entertain "an independent action" (Vaughn v. Petroleum Conversion Corp., 120 F. Sub. 175 Affirmed 211 F. 2d 499) to relieve a party from a judgment, order or proceeding or to grant relief to a defendant not actually personally notified as provided in 28 U.S.C. Section 1655, or to set aside a judgment for fraud upon the court (Martina Theatre

Corp. v. Schine Chain Theatres, Inc., 278 F. 2d 798; Hadden v. Rumsey Products, Inc., 196 F. 2d 92).

POINT III

A QUESTION OF FACT AS TO WHETHER OR NOT CARLETON IS GUILTY OF LACHES SHOULD BE PROPERLY RELEGATED TO THE TRIAL COURT.

It appears to be obvious to say that whether or not Carleton has been guilty of laches in the light of the circumstances presented here is a question of fact which should properly be relegated to the trial court and not decided summarily on a motion for summary judgment. A court must determine the issues of laches properly presented to it for determination (Molnar v. Gulfcoast Transit Co., 371 F. 2d 639, remanded for a determination of laches on the facts). Where trial court's ruling on a question of laches requires findings of fact, such finding will be sustained if there is substantial evidence to support them (Apex Electrical Mfg. Co., v. Maytag Co., 122 F. 2d 182).

It is well settled that question of laches is one of fact, and must be treated as such (Frank Adam Elec. Co. v. Federal Elec. Products Co., 200 F. 2d 210).

Such a serious question as a determination of laches barring relief, while within the sound descretion of the court, is to be exercised in the light of the circumstances before it (Willard v. Wood, 164 U.S. 502, 41 L. Ed. 531, 540, 17 S. Cd. 176; Boris v. Hamilton Mfg. Co. 253 F. 2d. 526; Potash Co. of America v. International Minerals & Chemical Corp., 213 F. 2d. 153) and according to right and justice (Chisholm v. House, 183 F. 2d. 689).

As stated previously, laches can only be determined in the light of the factual circumstances of the case. The record before the court below amply demonstrates that Carleton made every humanly conceivable effort to obtain relief. Carleton applied to Judge Pollack by letter and by personal visit for relief from the judgment. Unfortunately, Carleton lacked the legal procedural

expertise required to produce an application which would be accepted by Judge Pollack. There followed protracted correspondence in which Carleton wrote to the court, the New Jersey Commissioner of Insurance & Banking, the Attorney General of the State of New York, United States Senator Clifford Case, Judge Murray I. Gurfein, Chief Justice Burger of the United States Supreme Court, the Grievance Committee of the Association of the Bar of the City of New York, etc., in an effort to obtain the relief sought herein.

During this period of time, Carleton made every conceivable effort to obtain the assistance of counsel and was unable to do so.

In the light of this fact pattern, in the lower court Carleton contended that no laches was demonstrated. If Carleton was guilty of something similar to laches, it would simply be ignorance of procedural law. In this court, Carleton simply alleges that the question of laches is a question of fact which can only be determined by a trial court after a full hearing at which both sides may present their evidence. There is no way in which Carleton may be held guilty of laches by such a summary proceeding as a motion for a summary judgment.

The court below did not have the right to determine facts; it only had the right to determine if there were questions of fact.

Accordingly, the question of fact as to whether or not Carleton is guilty of laches should have been properly relegated to the trial court and the defendant's motion for summary judgment should have been denied.

POINT IV

THE QUESTION OF FACT AS TO WHETHER OR NOT CARLETON IS GUILTY OF UNCLEAN HANDS SHOULD BE PROPERLY RELEGATED TO THE TRIAL COURT. FURTHER, ASSUMING ARGUENDO, IF CARLETON WERE GUILTY OF UNCLEAN HANDS, HE WOULD NOT BE BARRED FROM THE RELIEF SOUGHT.

While it is true that in a proceeding seeking equitable relief there is an affirmative defense that the applicant comes into court with unclean hands, such an affirmative defense requires affirmative proof on the part of the respondent and as to the affirmative defense the burden of proof shifts to the respondent. In the case of Bar, there has been no adequate

showing by the defendants of unclean hands on the part of Carleton. One can only say that the conspiracy.

Therefore, it is respectfully asserted that the question as to whether or not Carleton has been guilty of coming into court with unclean hands in the light of the circumstances presented here is a question of fact which should also have been properly relegated to the trial court and not decided summarily on a motion for summary judgment.

Further, it is respectfully asserted that a determination of unclean hands, while within the sound descretion of the trial court is to be exercised specifically in the light of the factual context.

The issue raised by the Appellee of laches is one triable issue which should have prevented the entry of summary judgment against the Plaintiff and the issue presented by the Appellee of unclean hands is a second triable issue of fact which should have prevented the issue of summary judgment against the Plaintiff.

POINT V

CARLETON'S MOTION PAPERS MET THE BURDEN OF SETTING FORTH FACTS VERIFYING ALL OF THE ESSENTIAL ELEMENTS OF THE CAUSE OF ACTION SET FORTH IN THE COMPLAINT.

Carleton has correctly alleged in his complaint all of the grounds for the relief sought which apply in the light of his fact context. Such grounds obviously include fraud and mistake. Carleton alleges a conspiracy between his counsel and counsel for the other defendants which resulted in him being forced to settle a substantial damage action for a fraction of its real value. To prevent Carleton from re-opening the case would be to permit the fraud to be successfully perpetrated upon this court. However, Carleton does not seek to re-open the case in this particularly but he seeks to have an investigation be held of the conduct of all concerned in the prior litigation so that a court of competent jurisdiction can properly rule upon a full record.

Additionally, the relief sought at this time is not purely equitable in nature. Formerly, when law and equity were procedurally distinct and administered as in England in different courts an "action" for equitable relief was truely and distinctly a separate action brought in any court of equity having the requi-

site territorial power and jurisdiction to grant the relief sought.

At common law, there were two types of writs of error, totally legal in nature and not dependent upon equitable jurisdiction, to wit: The writ "coram hobis," which was a common writ issued by a superior to an inferior court and the writ "coram vobis," which issued to review proceedings previously held in the court issuing it. There have been comparatively few Federal cases dealing with such writs, although authority developed that Rule 60 as originally adopted did not prevent the use of these wirts (Preveden v. Hahn, 36 F. Sub. 952). The situation as to the common-law remedy of audita querela, which was available to correct judgments which became unjust by reason of subsequent developments has been similar.

However, whatever may have formerly been the situation as to such common-law remedies amended Rule 60(b) expressly declares that such writs are abolished and the procedure for obtaining any relief for a judgment shall be by motion as prescribed in the rules or by an independent action (United States v. Spadafora, 207 F. 2d. 291). Further, while any such writ or remedy is now mistakenly resorted to, the Judge hearing the writ has the option to treat it as a motion to vacate in appropriate circumstances.

It is obvious that actions for relief from a judgment or order are not purely legal or equitable by nature; but are sui generis, taking on the traits of each as it sees fit in the judicious use of the highest degree of descretion.

The requisit showing of fraud or mistake has been made and was not required to have been made.

The Court below had jurisdiction independent of the ancillary equitable jurisdiction to entertain the action for relief from a judgment or order.

CONCLUSION

The judgment, order and decisions of the trial Court, which summarily deprived the Court of its right to inquire into the charges plaintiff has levied, constitute a travesty of justice, without legal authority, and must be reversed.

It is respectfully submitted that this Court should reverse the judgment and order granting summary judgment and direct the defendants to file their answer within twenty days of the entry of the order in this Court so that this plaintiff may finally have his day in Court.

Respectfully submitted,

Palisades, New Jersey
October 14th, 1974

ROBERT A. W. CARLETON, JR.
Plaintiff-Appellant
Appearing Pro Se

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
CITY OF NEW YORK) ss.:
COUNTY OF NEW YORK)

A. JUNE VICKERS, being duly sworn, according to law, deposes and says:

and

On October 15, 1974, deponent served the within Appellant's Reply Brief Upon Appeal upon Messrs. Amend & Amend, attorneys for defendants-appellees, Union Free School District No. 8, Town of Orangetown, Rockland County, New York, George W. Renc, Lee & Starker, Edward C. Manning, Walter Reiner and Richard Stobaeus in this action at 40 Wall Street, New York, New York 10005 and upon Messrs. Bernstein, Weiss, Parter, Coplan & Weinstein, attorneys for defendant-appellee Cordill, Rowlett & Scott in this action, at 120 East 41st Street, New York, New York 10017, the addresses designated by said attorneys for that purpose by depositing true copies of same enclosed in post paid, properly addressed wrappers in an official depository under the exclusive care and custody of the United States Postal Service within the City, County and State of New York.

A. June Vickers
A. JUNE VICKERS

Sworn to Before me this

15th Day of October 1974

Herman A. Stuhl
HERMAN A. STUHL
Notary Public, State of New York
No. 31-9230450
Qualified in New York County
Commission Expires March 30, 1976